INDEX.

Index to Cases Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 115.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

LULA BURTCH, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BURTCH, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

BRIEF FOR RESPONDENT.

The Writ of Certiorari Should be Dismissed.

The writ of certiorari should be dismissed for lack of jurisdiction. The only ground of Federal jurisdiction in this case is the claim of petitioner that the ensilage cutter was being transported in interstate commerce at the time of the accident. *The jury expressly found that there was no evidence on this point.* (Record, page 17.)

Petitioner, upon the trial, submitted to the jury certain interrogatories to be answered in case a general verdict was returned, and among them were the following: "Eight. Did said car come in said train from Louisville, Kentucky, to Commiskey? Answer. Train came from Louisville. No evidence where car came from." "Did said cutter come to said Commiskey in said car from Louisville, Kentucky? Answer. No evidence." (Record, page 17.)

In the case of *United States Shipping Board Emergency Fleet Corporation v. Sullivan* (261 U. S., 146), this court dismissed the writ of error and denied a writ of certiorari where the State courts held that there was no evidence to establish the facts necessary to show Federal jurisdiction under section 237 of the Judicial Code. The present case is exactly similar. In the Sullivan case, Sullivan sued the United States Emergency Fleet Corporation for damages for personal injury. The claim of defendant was that Sullivan was a Federal employee and hence action should have been under the Federal Employers' Liability Act. The State courts found no evidence to substantiate this claim. In the present case the State court found no evidence showing the ensilage cutter was being transported in interstate commerce at the time the accident occurred. The claim of Federal jurisdiction is so frivolous that the writ of certiorari should be dismissed. As stated by Mr. Justice McReynolds in the case of *Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n*, 242 U. S., 430:

> Petitions for writs of certiorari are at the risk of the parties making them, and whenever in the progress of the cause facts develop which if disclosed on the application would have induced a refusal, the

court may upon motion by a party or *ex mero motu,* dismiss the writ.

St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S., 265, 276.

Respondent's Answer to Specifications of Error.

The respondent, answering petitioner's specifications of error, severally says:

1st. That the shipment in this case was not shown by the evidence to be an article of interstate commerce, and petitioner's tendered instructions were not applicable to the evidence and were also erroneous in substance.

2d. Respondent's decedent was not the consignee of the shipment and was not in any way obliged to unload or assist in unloading the same; but was called into the service of petitioner in the performance of an act which its representative determined to be a part of its duties as carrier. Petitioner is liable to an employe injured by its negligence in such circumstances, although it might have decided that the shipment was excessively heavy and declined to unload the same.

Correction of Statements in Petitioner's Brief.

1. The shipment of the ensilage cutter involved in this case, which petitioner claims was an interstate shipment, is not shown to have originated at Louisville, Kentucky, and to have been carried by it to Commiskey, Indiana, by the train and employees charged with respondent's injuries; but, on the contrary, the place at which the ensilage cutter was taken into the train is *not* disclosed by the evidence.

Charles F. Lurton, the only witness upon this point, testified as follows: "Q. From where did you obtain it (the ensilage cutter)? A. Through an Indianapolis concern, but it was shipped from a warehouse in Louisville." (Record, page 59.)

Petitioner, upon the trial, submitted to the jury certain interrogatories to be answered in case a general verdict was returned, and among them were the following: "Eight. Did said car come in said train from Louisville, Kentucky, to Commiskey? Answer. Train came from Louisville. No evidence where car came from." "Did said cutter come to said Commiskey in said car from Louisville, Kentucky? Answer. No evidence." (Record, page 17.)

2. The ensilage cutter did not belong to respondent's decedent and other farmers, and he did not go to the train to get it. (Record, page 16.)

Points and Authorities.

I.

First Paragraph of Complaint.

One who, at the request of the conductor in charge of a freight train, an emergency existing reasonably requiring such assistance, temporarily assists in the work of the carrier in unloading a heavy machine from one of its cars, the regular crew not being reasonably able to unload the same, is for the time being the servant of the carrier and entitled to the same protection as any other servant.

St. Louis, etc., R. R. Co. *v.* Bagwell, 33 Okla., 189; 40 L. R. A. (N. S.), 1180;

Aga *v.* Harbach, 127 Ia., 144; 109 Am. St. Rep., 377; 4 Ann. Cas., 441;

Fox *v.* Chicago, etc., R. Co., 86 Ia., 368; 17 L. R. A., 289;
Sloan *v.* Central Iowa R. Co., 62 Ia., 728;
Fiesel *v.* N. Y. Edison Co., 108 N. Y. Supp., 130;
Gunderson *v.* Eastern Brewing Co., 130 N. Y. Supp., 785;
Marks *v.* Rochester R. Co., 146 N. Y., 181; 40 N. E., 782;
Georgia P. R. Co. *v.* Propst, 83 Ala., 518;
Jackson *v.* Southern R. Co., 73 S. C., 557;
Louisville & N. R. Co. *v.* Ginley, 100 Tenn., 472;
W. H. Neill Co. *v.* Rumpf, 148 Ky., 807;
Street Ry. Co. *v.* Bolton, 43 Ohio St., 224;
Haluptzok *v.* Great Northern R. Co., 55 Minn., 446; 26 L. R. A., 739;
Maxson *v.* J. I. Case, etc., Co., 81 Neb., 546; 16 L. R. A. (N. S.), 963.

II.

Second Paragraph of Complaint.

A person not an employee having an interest in a proper way in work in charge of a master's servants, who at the request or with the consent of such servants undertakes to assist in the work, is not a volunteer and does not do so at his own risk; and if he is injured by the carelessness of such servants the master is responsible in tort.

Holmes *v.* Northeastern R. Co., L. R., 4 Exch., 254;
Wright *v.* London & N. W. R. R. Co., L. R., 1 Q. B. Div., 252;

Rink *v.* Lowry, 38 Ind. App., 132;
Empire Laundry, etc., Co. *v.* Brady, 60 Ill. App., 379;
Street Ry. Co. *v.* Bolton, 43 Ohio St., 224;
Welch *v.* Maine Central R. Co., 86 Me., 552;
Meyer *v.* Kenyon-Rosing, etc., Co., 95 Minn., 329;
Kelly *v.* Tyra, 103 Minn., 176; 17 L. R. A. (N. S.), 334;
McConnell *v.* Pennsylvania R. Co., 223 Pa., 442;
Louisville, etc., R. Co., *v.* Ward, 98 Tenn., 123;
Eason *v.* Sabine & E. T. R. Co., 65 Tex., 577; 57 Am. Rep., 606;
Weatherford, etc., R. Co. *v.* Duncan, 88 Tex., 611.

III.

MOTION FOR NEW TRIAL, REASONS 1-5.

The long-continued practice and custom of petitioner's conductors in calling bystanders to assist in unloading heavy articles of freight showed its interpretation of its duty under traffic regulations, consent to, and ratification of such acts by its agents, and was and is competent evidence.

Haluptzok *v.* Great Northern R. Co., 55 Minn., 446; 26 L. R. A., 739;
Leavenworth Electric R. Co. *v.* Cusick, 60 Kan., 597.

IV.

MOTION FOR NEW TRIAL, REASONS 6-11.

The practical construction given to a statute or rule by officers charged with its execution will always be regarded

by the courts, and long-continued usage is equivalent to positive law. O. P. Gothlin was a competent witness, and had a right to testify to the general practice and usage with reference to the traffic rule in question.

Board of Commissioners *v.* Bunting, 111 Ind., 143;
State *ex rel. v.* Harrison, 116 Ind., 300;
Logansport Credit Exchange *v.* Sands, 54 Ind. App., 562.

V.

Motion for New Trial, Cause 17.

Instruction No. 7 tendered and requested to be given by petitioner reads as follows:

> "No. 7. If you find that the ensilage cutter was shipped in a train running from Louisville, Kentucky, to Commiskey, and other points in Indiana, I charge you that this was an interstate shipment and said train and employees were engaged in interstate commerce and the relations of employees and defendant were governed by the Federal law and the law of the State of Indiana. I charge you that if you should find from the evidence that the plaintiff was an employee of defendant at the time he received his injury and you further find that plaintiff could have known the weakness of planks used or could have known the same by using due care, he cannot recover, as he must be held to have assumed the risk." (Rec., 28.)

1. An article shipped from one point to another within a State, although shipped in a train running from one State

to another, is not an interstate shipment, and this instruction is not a correct statement of the law upon that point.

Luken *v.* Lake Shore, etc., R. Co., 248 Ill., 377; 21 Ann Cas., 82;

McCutchen *v.* Atlantic Coast Line R. Co., 81 S. C., 71;

St. Louis, etc., R. Co. *v.* True Bros., Tex. Civ. App., —; 140 S. W., 827.

2. The jury having expressly found that there was no evidence that the ensilage cutter was an interstate shipment, this instruction was not applicable to the evidence, and was for that reason rightfully refused.

Cleveland Ry. Co. *v.* Gossett, 172 Ind., 525;

Terre Haute Electric Co. *v.* Roberts, 174 Ind., 351;

Cleveland Ry. Co. *v.* Case, 174 Ind., 369;

Domestic Coal Co. *v.* De Armey, 179 Ind., 592.

3. This instruction is further erroneous in charging that "if plaintiff could have known the weakness of planks used," he could not recover. An employee is not bound at his peril to know the safety of appliances used, and is only required to exercise ordinary care to discover defects while giving attention to the performance of his duties as an employee; and assumption of the risk in any given case is not a question of law, but a question of fact for the jury, under proper instructions from the court.

Central Vt. Ry. *v.* White, 238 U. S., 507;

Gila Valley Ry. Co. *v.* Hall, 232 U. S., 94;

Diezi *v.* Hammond Co., 156 Ind., 583, 587;

Rogers *v.* Leyden, 127 Ind., 50;

Ambre *v.* Postal Tel. Cable Co., 43 Ind. App., 47.

VI.

Motion for New Trial, Cause 17.

Instruction No. 8, tendered and requested to be given by petitioner, reads as follows:

> "If you find from the evidence in this case that plaintiff and one Arbuckle went to a nearby saw mill and there procured certain planks or timbers for the purpose of unloading said ensilage cutter, and that plaintiff had full opportunity to see and examine said planks and that plaintiff and said Arbuckle then carried said planks to the car and placed the same upon said car for said purpose, and that plaintiff failed to use care in examining said planks or misjudged the strength thereof and one of said planks broke and plaintiff was thereby injured, he cannot recover and your verdict must be for the defendant."

1. This instruction is not applicable to the evidence, as declared by the jury; and it erroneously assumes that respondent's decedent was, at the time, an interstate employee and subject to the Federal Employers' Liability Act. The court must not in an instruction, assume as true any fact in dispute.

Southern Ry. Co. *v.* Limback, 172 Ind., 89;
Beery *v.* Driver, 167 Ind., 127;
Louisville, etc., T. Co. *v.* Cotner, 71 Ind. App., 377.

2. This instruction is fundamentally wrong, since it is not enough to defeat an injured employee that he had an opportunity to see and examine an appliance by which he was injured, but he must also know and appreciate all the con-

ditions of its use and its fitness for the same. This latter element is wholly omitted from the instruction. It is the master's duty to furnish safe and suitable appliances; and assumption of the risk is not a question for the court, but a matter of fact for the jury.

Seaboard Air Line Ry. Co. *v.* Horton, 233 U. S., 492, 501;

Standard Forgings Co. *v.* Saffel, 176 Ind., 417;

Romona Stone Co. *v.* Shields, 173 Ind., 68;

Ross *v.* May, — Ind. App., —; 140 N. E., 581.

VII.

Assumption of Risk.

Petitioner's conductor, Jackson, examined and tested the timbers, and thereupon assured respondent's decedent that they were sufficient, and "would hold"; in these circumstances there can be no assumption of the risk unless the danger is obvious and fully appreciated.

Bradbury *et al. v.* Goodwin, 108 Ind., 286;

M.-H. Basket Machine Co. *v.* Lyon, etc., 28 Ky. Law Rep., 471;

Chesapeake & O. Ry Co. *v.* Shepherd, 153 Ky., 350

Berube *v.* Horton, 199 Mass., 421;

Burkard *v.* Rope Co., 217 Mo., 466;

Galveston, H. & S. A Ry. Co. *v.* Sanchez, 57 Tex. Civ. App., 87.

IX.

Right Result.

It is manifest that if any technical error was committed by the trial court it was harmless, and that respondent was

clearly entitled to recover, and that a right result was reached. A statute of Indiana provides: "Nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below."

Burns Statutes, 1914, section 700.

ARGUMENT.

The first paragraph of the complaint in this case is supported in every particular by the case of *St. Louis & S. F. R. Co. v. Bagwell,* 33 Okla., 189, and cases therein cited. In that case the court held the complaint good and affirmed a judgment in favor of the plaintiff, stating the legal principle concisely as follows:

> "'The plaintiff was engaged in defendant's work at the request of the conductor in charge of the train, and, although it may be said that his employment was for mere temporary purposes, still, being in defendant's employ at the request of its servant or a conductor who was in charge of the train, an emergency existing reasonably requiring such assistance in the work of the carrier in the unloading of a safe from one of its cars, the regular crew not being reasonably able to unload the same, he was not a trespasser, but, for the time being, the servant of the defendant."

The following quotation from the opinion in the case of *Marks v. Rochester R. Co.,* 146 N. Y., 181, is pertinent to the case at bar:

> "While the evidence is not very direct or satisfactory as to the necessity for aid, we think that question was properly submitted to the jury. The defendant

> gave no evidence upon the point. The conduct of the driver indicates that in his opinion assistance was necessary, and the jury might reasonably have reached the conclusion upon the evidence before them, in the absence of any contradictory evidence, that there was an emergency which gave to the driver authority to call in outside aid on the occasion. The authority of a servant is not in all cases confined to the rendering of personal service. In every business and employment there are exigencies which are not anticipated, and which require a servant to act, in the absence of the principal, for the immediate protection of his interests; and he may do things in his interest when the emergency arises which transcend his usual authority, and they will be deemed to have been authorized. The jury having found that such an emergency existed in this case, the employment of the plaintiff to drive the horse was the act of the principal, and if his employment in this service directly by the principal would have been an act of negligence, his employment by the driver, acting for the time being in place of the master, was a negligent act imputable to the defendant."

The second paragraph of the complaint proceeds upon the theory that respondent was not an employee of petitioner, but was upon petitioner's right of way with its consent and at its request and expediting the work because of an interest in the shipment being unloaded, and while so engaged was injured by the negligence of petitioner's servants. The authorities abundantly sustain respondent's right of recovery upon this ground. The case of *Kelly v. Tyra,* 103 Minn., 176, supports this principle and cites many other cases. The following quotation from *Welch v. Maine Central R. Co.,*

86 Me., 552, fully states the doctrine and distinction between a mere volunteer and a licensee with an interest:

> "The distinction running all through the cases is this: That, where a mere volunteer—that is, one who has no interest in the work—undertakes to assist the servants of another, he does so at his own risk. In such a case the maxim of *respondeat superior* does not apply. But where one has an interest in the work, either as consignee or the servant of a consignee or in any other capacity, and, at the request or with the consent of another's servants, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their master is responsible. In such a case the maxim of *respondeat superior* does apply. The hinge on which the cases turn is the presence or absence of self interest. In the one case, the person injured is a mere intruder or officious intermeddler; in the other, he is a person in the regular pursuit of his own business, and entitled to the same protection as any one whose business relations with the master exposes him to injury from the carelessness of the master's servants.
>
> "This distinction is sustained by the cases cited, and by every modern text-book to which our attention has been called; and we are not aware of a single authority which holds the contrary."

Petitioner objected to proof introduced by respondent to the effect that at Commiskey petitioner's conductors, covering a period of more than 15 years had pursued the practice and established the custom of calling by-standers to assist in unloading heavy articles of freight. This evidence was not only proper, but material and important as tending to prove authority on the part of such conductors to employ extra help

and knowledge and ratification of their acts on the part of petitioner. In the case of *Haluptzok v. Great Northern R. Co.*, 55 Minn., 446, the court with regard to the authority of the servant to employ assistance and his practice in doing so, said:

> "Such authority may, however, be implied as well as express, and subsequent ratification is equivalent to original authority; and where the servant has authority to employ assistants, such assistants, of course, become the immediate servants of the master, the same as if employed by him personally. Such authority may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the master by the servant for so long a time that knowledge and consent on the part of the master may be inferred. It is not necessary that a formal or express employment on behalf of the master should exist, or that compensation should be paid by or expected from him."

Petitioner sought to shield itself in this case behind a rule permitting it to require the consignee to unload heavy freight shipments. Respondent met this contention by showing that this rule was not operative until the carrier had first placed the car containing such shipment in a suitable and convenient position to be unloaded and had given notice thereof to the shipper. O. P. Gothlin, chief of the tariff bureau of the Public Service Commission of Indiana, and charged with the enforcement of this rule, and familiar with its practical interpretation, testified to such facts. This evidence was entirely competent. The courts of this State have frequently affirmed the principle that great regard will be given by the courts to the practical construction of a statute or rule by

officers charged with its execution. In *Board of Commissioners v. Bunting,* 111 Ind., 143, 145, the court said:

> "We know judicially that it has always been the custom to make suitable provision for the sheriff's residence, and this custom has given a construction to the law which could not be disregarded, even if there was doubt as to the meaning of the statute."

Petitioner's chief complaint is based upon the refusal of the trial court to give two instructions to the jury, tendered by its counsel, and numbered seven and eight. The propriety of giving these instructions as pertinent, and accurate statements of the law, was not discussed by respondent's counsel before the Supreme Court of Indiana, because it was believed and urged upon that court, that they were not properly in the record. Instruction No. 7, requested by petitioner, reads as follows:

> "If you find that the ensilage cutter was shipped in a train running from Louisville, Kentucky, to Commiskey and other points in Indiana, I charge you that this was an interstate shipment, and said train and employees were engaged in interstate commerce and the relations of the employees and defendant were governed by the Federal law and the law of the State of Indiana. I charge that if you should find from the evidence that the plaintiff was an employee of defendant at the time he received his injury and you further find that plaintiff could have known the weakness of planks used or could have known the same by using due care, he cannot recover as he must be held to have assumed the risk." (Record, page 28.)

The trial court was justified in refusing to give this instruction for at least three reasons:

1st. It declares that if the ensilage cutter was shipped in a *train* running from Kentucky into Indiana, it was an interstate shipment. So far as the evidence goes, the ensilage cutter may have been taken into this local train at New Albany, Jeffersonville, Charlestown or some other waystation in Indiana, and carried from thence to Commiskey. An article of merchandise carried from one point to another in the same State, although carried by an interstate train, is not an article of interstate commerce. The case of *Luken v. Lake Shore,* etc., R. Co., 248 Ill., 377, expressly decides this point, using the following language:

> "The transportation of property between points within a state by a railroad engaged in interstate traffic does not, of itself, determine the character of the traffic and make it interstate commerce. It is not the character of the road by which the property is transported, but the character of the traffic that determines whether or not it is interstate or intrastate commerce."

2nd. The jury at petitioner's request in answer to an interrogatory, found that there was no evidence that the ensilage cutter came in the car from Louisville, Kentucky. (Record, page 17.)

This instruction was therefore not applicable to the evidence for that reason was properly refused.

3rd. This instruction is wrong in substance for the further reason that it states the law to be that if respondent's decedent could have known the weakness of the planks used

he must be held to have assumed the risk, and could not recover. This is not the law. It was not shown that decedent knew or might have known the weight of the ensilage cutter or the strength required in the timbers to sustain its weight. The tendered instruction wholly omits these very essential facts. An employee is only required to exercise ordinary care in regard to the safety of appliances furnished by the master, while giving due attention to the performance of his duties as a servant. The circumstances and conditions are very rare, when a court can declare as a matter of law that an injured employee must be held to have assumed the risk; but ordinarily, and in this case, the question of assumption of the risk is a fact to be determined by the jury guided by proper instructions from the court.

Instruction No. 8, requested by petitioner reads as follows:

> "If you find from the evidence in this case that plaintiff and one Arbuckle went to a nearby sawmill and there procured certain planks or timbers for the purpose of unloading said ensilage cutter and that plaintiff had full opportunity to see and examine said planks and that plaintiff and said Arbuckle then carried said planks to the car and placed the same upon said car for said purpose and that plaintiff failed to use care in examining said planks or misjudged the strength thereof and one of said planks broke and plaintiff was thereby injured, he cannot recover and your verdict must be for defendant." (Record, page 28.)

This instruction, like No. 7 already discussed, is not applicable to the evidence as declared by the jury. In addi-

tion, it erroneously assumes that the decedent Burtch was an interstate employee; and the court is never permitted, in an instruction, to assume as true any matter in dispute.

2nd. The instruction is erroneous and wrong in substance, since it wholly ignores and omits to mention respondent's lack of knowledge and opportunity to know of the weight of the ensilage cutter, and his ability to appreciate the danger in attempting to unload the same by means of these timbers. Furthermore, it was not proper for the court to give a mandatory instruction on the assumption of the risk, but that question must be determined by the jury as any other fact.

An employee's right to recover for an injury caused by a defective appliance cannot be defeated merely because he had an opportunity to see and examine such appliance. He must also know and appreciate the danger and hazard to be encountered from its use in the particular instance and circumstances.

In the case of *Gila Valley Ry. Co. v. Hall*, 232 U. S., 94, 101, this court, upon that point, said:

> "Moreover, in order to charge an employee with the assumption of a risk attributable to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the dangerous condition, but that he knew that it endangered his safety; or else the danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it. If with this actual or constructive knowledge he remains in the service and encounters the danger, he will be held to have assumed the risk."

In the case at bar petitioner's conductor, Jackson, knew the weight of the ensilage cutter; knew the conditions, and the manner in which it was to be unloaded, and with this knowledge inspected and examined the timbers, and thereupon said "they would hold." (Record, page 76.) This assurance on the part of petitioner's representative absolved the respondent thereafter from any charge of assumption of the risk.

Finally, we insist that, except as to the amount of damages, which is too small, the verdict of the jury is manifestly right. Petitioner does not seriously contend that the judgment cannot justly rest upon the second paragraph of complaint, which in no way depends upon the Federal Statute. In view of the answers of the jury to special interrogatories, it is equally clear that if petitioner's refused instructions had been given, the result would have been the same. In these circumstances, we submit that the statute of Indiana should be applied, which provides, that no judgment shall be reversed in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below.

The writ of certiorari should be dismissed or the judgment below affirmed.

Respectfully submitted,

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